Supreme Court, U.S.
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No. 95-696

In the Supreme Court of the United States

OCTOBER TERM, 1995

GARY ZUSPANN, PETITIONER

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had subject-matter jurisdiction over petitioner's claim for veterans' benefits.

2. Whether petitioner had a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of the Department of Veterans Affairs based on the denial of his claim for veterans' benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 60 F.3d 1156. The opinion of the district court (Pet. App. 12-20) is reported at 864 F. Supp. 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21-22) was entered on August 11, 1995. The petition for a writ of certiorari was filed on October 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Veterans of the armed services may receive compensation and medical treatment for service-connected disabilities. See 38 U.S.C. 1110, 1131, 1701 *et seq.*, 5101(a) (Supp. V 1993). If a veteran is dissatisfied with the initial decision of the Secretary of Veterans Affairs (VA) on a claim for disability benefits, the veteran generally may appeal that decision to the Board of Veterans' Appeals. 38 U.S.C. 7104(a) (Supp. V 1993). The Board then makes a "[f]inal decision[]" for the Secretary. *Ibid.*

Decisions of the Board are subject to review under the Veterans' Judicial Review Act (VJRA or Act), codified as Chapter 72 of Title 38. See Pub. L. No. 100-687, Div. A, Tit. III, § 301, 102 Stat. 4113 (1988). The Act provides that the Board's decisions may be reviewed only by the Court of Veterans Appeals (COVA), an Article I court of record. 38 U.S.C. 7251, 7252(a) (Supp. V 1993). Decisions of the COVA are, in turn, subject to judicial review only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292 (Supp. V 1993). The Federal Circuit's review of a COVA decision is limited to the question of "the validity of any statute or regulation * * * or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [COVA] in making the decision." 38 U.S.C. 7292(a) (Supp. V 1993). Except as necessary to decide "a constitutional issue," the Federal Circuit "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. 7292(d)(2) (Supp. V 1993).

The scheme prescribed in the VJRA for review of the Board's decisions by the COVA and the Federal Circuit is exclusive of other remedies. Except for such review, the Secretary's decision on a claim for veterans' disability benefits "may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. 511(a) (Supp. V 1993).[1]

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[1] Section 511 of Title 38 (38 U.S.C.) (Supp. V 1993) provides:

> (a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.
>
> (b) The second sentence of subsection (a) does not apply to —
>
> (1) matters subject to section 502 of this title;
>
> (2) matters covered by sections 1975 and 1984 of this title;
>
> (3) matters arising under chapter 37 of this title; and
>
> (4) matters covered by chapter 72 of this title.

The only exception in subsection (b) applicable to the Secretary's decisions concerning an individual veteran's disability benefits is in subsection (b)(4), which authorizes review under the VJRA (codified in part as Chapter 72 of Title 38). The other exceptions in subsection (b) are inapplicable here. Subsection (b)(1) provides for judicial review of regulations adopted by the Secretary. See 38 U.S.C. 502 (Supp. V 1993). Subsection (b)(2) concerns civil actions related to life insurance. See 38 U.S.C. 1975, 1984 (Supp. V 1993). Subsection (b)(3) relates to housing and small business loans. See 38 U.S.C. 3701 *et*

b. Petitioner served in the United States Navy as a mess cook on the *U.S.S. New Orleans* during the Persian Gulf War. Petitioner contends that during his service he was exposed to various pollutants, including smoke from oil fires, diesel-engine exhaust, and volcanic ash. After returning to the United States, he claims to have suffered health problems from that exposure. Two private physicians believed that petitioner had "chemical sensitivity" and should be put in an "environmental unit" to identify the chemicals causing his problems. A physician employed by the Department of Veterans Affairs, however, disagreed with that assessment. The Secretary has declined to provide petitioner with treatment in an environmental unit or with reimbursement for such treatment. Pet. App. 1-2, 13-14.

2. Petitioner filed the present action in the United States District Court for the Western District of Texas, naming the Secretary and three other VA officials as defendants. He claimed that the Secretary violated the Rehabilitation Act of 1973 and the Fifth Amendment by refusing him treatment in an environmental unit. He also asserted *Bivens* claims against the other respondents, contending that the refusal to treat him in an environmental unit unconstitutionally deprived him of his property interest in disability benefits. The Secretary moved to dismiss the action. Pet. App. 12-13.

The district court dismissed the action, holding that it lacked jurisdiction over petitioner's claims. Pet. App. 12-20. The court determined that "[t]he

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seq. (Supp. V 1993). See generally *Sugrue* v. *Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994), cert. denied, 115 S. Ct. 2245 (1995).

detailed nature of the procedural and appellate structure contained within the Veterans' Judicial Review Act clearly indicate Congress' intent to confine decisions affecting veteran's benefits within this structure." *Id.* at 17. The court also determined that petitioner's challenge to the denial of disability benefits was "precisely" the type of challenge that Congress intended to be reviewed exclusively under the Act. *Id.* at 18.

3. The court of appeals affirmed. Pet. App. 1-11. It held, first, that the district court lacked subject-matter jurisdiction over petitioner's claim against the Secretary. The court observed that "the [VJRA] * * * clearly announced the intent of Congress to preclude review of benefits determinations in federal district courts." *Id.* at 5. The court further held that petitioner's *Bivens* claims were properly dismissed, because "[s]pecial factors counsel[ed] hesitation to create a *Bivens* remedy in this case." *Id.* at 11. The court identified those factors as the "elaborate remedial structure" created in the VJRA and the Act's "explicit[] preclu[sion] [of] judicial review of veterans' benefits disputes." *Ibid.*

ARGUMENT

1. The court of appeals correctly upheld the dismissal of petitioner's claim that the Secretary violated the Rehabilitation Act and the Fifth Amendment by refusing to provide or pay for treatment in an environmental unit. Pet. App. 3-8. Moreover, the court of appeals' decision does not conflict with the decision of any other court of appeals or raise any issue of general importance warranting this Court's review.

Section 511(a) of Title 38 provides that the Secretary "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. 511(a) (Supp. V 1993). Section 511(a) further provides that, with certain exceptions, the Secretary's decision on such a question is "final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Ibid.* The only exception arguably applicable here is prescribed in the VJRA, which provides for review in the COVA and the Federal Circuit of final decisions of the Secretary made by the Board of Veterans' Appeals. 38 U.S.C. 511(b)(4) (Supp. V 1993).

As both courts below correctly concluded, petitioner's claim falls squarely within the category of disputes covered by Section 511(a). Petitioner disagrees with the Secretary's determination that his disability does not require treatment in an environmental unit. That determination is a "decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. 511(a) (Supp. V 1993); see 38 U.S.C. 1710(a)(1)(D) (Supp. V 1993) (requiring Secretary to "furnish hospital care * * * *which the Secretary determines is needed* * * * to a veteran who has a service-connected disability rated at 50 percent or more") (emphasis added); see also 38 U.S.C. 1703(a) (Supp. V 1993) (authorizing Secretary to pay for services that cannot be provided by VA facilities). The Secretary's decision was therefore reviewable, if at all, only by the COVA and the Federal Circuit pursuant to the VJRA (see 38 U.S.C. 511(b)(4) (Supp. V 1993)), and not

"by any other official or by any court" (38 U.S.C. 511(a) (Supp. V 1993)), including the district court.[2]

In contending that Section 511(a) did not bar district court jurisdiction over his claim, petitioner relies primarily (Pet. 11-12) on *Traynor* v. *Turnage*, 485 U.S. 535 (1988). In *Traynor*, the Administrator of the Veterans' Administration (VA) refused to extend the time within which two veterans recovering from alcoholism could use their veterans' education benefits. 485 U.S. at 537. He based that refusal on a VA regulation defining alcoholism as "willful misconduct" that precluded such extensions of time. *Id.* at 538-539. The veterans brought actions against the Administrator in federal district court, claiming that

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[2] It is not clear whether the Board had authority to review the Secretary's decision refusing to provide or pay for petitioner to be treated in an environmental unit. The Board has authority to review the Secretary's decision regarding "eligibility for hospitalization, outpatient treatment," 38 C.F.R. 20.101(b), and reimbursement for unauthorized medical expenses, 38 C.F.R. 20.101(a)(15). The Board lacks authority, however, to review the Secretary's "determinations of the need for and appropriateness of specific types of medical care and treatment for an individual." 38 C.F.R. 20.101(b). The Secretary's decision in this case appears to fall into the latter category, but the matter is not free from doubt because petitioner did not seek Board review of that decision. If the Board indeed lacked jurisdiction to review the Secretary's decision, judicial review of the Secretary's decision would not be available under the VJRA, since the VJRA provides for judicial review (by the Federal Circuit, following review by the COVA) only of decisions by the Board. In any event, although it is not clear whether review of the Secretary's decision in the present case was available under the VJRA (see 38 U.S.C. 511(b)(4) (Supp. V 1993)), it *is* clear that review of that decision was *not* available in the district court, because the decision fell within Section 511(a).

the regulation violated the Rehabilitation Act. *Id.* at 539-540. The Administrator argued that judicial review of the Rehabilitation Act claim was precluded by a predecessor of Section 511(a), codified as 38 U.S.C. 211(a) (1982), which barred judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the [VA] providing benefits for veterans." *Traynor*, 485 U.S. at 539, 540-541.

This Court rejected the Administrator's argument, finding "no clear and convincing evidence of any congressional intent to preclude a suit claiming that § 504 of the Rehabilitation Act * * * has invalidated an otherwise valid regulation issued by the [VA]." *Traynor*, 485 U.S. at 543. The Court construed Section 211(a) to bar judicial review of challenges to the Administrator's interpretations of veterans' benefits laws, but not challenges based on laws that are not specifically related to veterans benefits, such as the Rehabilitation Act and the Constitution. 485 U.S. at 543-544.

As part of the VJRA, Congress amended Section 211(a) to respond to "*Traynor*-type cases." H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 21 (1988). As amended, Section 211(a)—now codified in substantially identical form as Section 511(a)—gave the Secretary exclusive jurisdiction to "decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans." VJRA § 101(a), 102 Stat. 4105. The House Report on the amendment explained that it would bar district court review of claims that the Secretary's denial of veterans benefits violated federal laws not specifically related to

veterans, such as the Rehabilitation Act and the Constitution. H.R. Rep. No. 963, *supra*, at 27, 30. The House Report also observed that such claims could only be reviewed, as relevant here, by the COVA and, thereafter, the Federal Circuit pursuant to the review scheme enacted as Title III of the VJRA (codified as Chapter 72 of Title 38). H.R. Rep. No. 963, *supra*, at 27.[3]

Since Section 211 was amended in 1988, the courts of appeals have consistently held that it bars district court review of claims similar to petitioner's. For example, *Larrabee* v. *Derwinski*, 968 F.2d 1497 (2d Cir. 1992), involved a substantive and procedural due process challenge to the Secretary's determination of the appropriate treatment for a veteran's medical condition. *Id.* at 1498. The Second Circuit held that Section 511(a) barred district court jurisdiction over the claim; such a claim had to "be pursued within the appellate mill Congress established in the VJRA." 968 F.2d at 1501. See also, *e.g.*, *Sugrue* v. *Derwinski*, 26 F.3d 8, 10-11 (2d Cir. 1994), cert. denied, 115 S. Ct. 2245 (1995); *Hicks* v. *Veterans Admin.*, 961 F.2d 1367, 1368-1369 (8th Cir. 1992).[4]

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[3] Petitioner errs in contending (Pet. 16-18) that the House Report cited in the text is not authoritative, in light of a later "Compromise Agreement" between the House and the Senate. The Explanatory Statement on the Compromise Agreement makes clear that the Senate accepted the House provision amending Section 211(a). The only change made to the House provision by the Compromise Agreement was a minor change in wording. Compare H.R. Rep. No. 963, *supra*, at 54 (reproducing Section 211, as amended by House bill) with 102 Stat. 4105 (final version of amended Section 211).

[4] Petitioner's reliance (Pet. 13-14, 24) on *Marozsan* v. *United States*, 852 F.2d 1469 (7th Cir. 1988) (en banc), is

2. Petitioner also challenges (Pet. 25-26) the dismissal of his *Bivens* claims against respondents other than the Secretary. The court of appeals correctly held that *Bivens* does not create a cause of action based on an individual dispute about veterans' benefits. Pet. App. 9-11. The recognition of a *Bivens* remedy would be inconsistent with the elaborate system for review of such disputes established by the VJRA. Compare *Schweiker* v. *Chilicky*, 487 U.S. 412, 427-428 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). The court of appeals' holding on the *Bivens* issue accords with the only other court of appeals decision to address the issue. See *Sugrue*, 26 F.3d at 12-13.

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misplaced. *Marozsan* construed the version of Section 511(a) (then Section 211(a)) in effect prior to its 1988 amendment, and, relying on *Traynor*, held that the district court had jurisdiction to review a veteran's challenge to the constitutionality of the VA's procedure for addressing benefit claims. See 852 F.2d at 1473 n.11, 1475-1476; see also *id.* at 1481 (Posner, J., concurring) (*Traynor* "seems dispositive"). In light of the 1988 amendments to Section 211(a), *Marozsan* is inapposite here for the same reason as is *Traynor*. Moreover, even before the 1988 amendments, other federal courts consistently held that the predecessor of Section 511(a) barred district court jurisdiction over disputes involving individual veterans benefit decisions. See, *e.g.*, *Higgins* v. *Kelley*, 824 F.2d 690, 691 (8th Cir. 1987); *In re "Agent Orange" Prod. Liability Litigation*, 818 F.2d 194, 201 n.2 (2d Cir. 1987); *Anderson* v. *Veterans Admin.*, 559 F.2d 935, 936 (5th Cir. 1977); *Ryan* v. *Cleland*, 531 F. Supp. 724, 730-731 (E.D.N.Y. 1982). Petitioner's claim relates to an individual benefits decision, rather than the procedures by which such decisions are made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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